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BEFORE THE BOARD OF OIL, GAS, AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

Genwal Resources, Inc., **Petitioner and Permittee,** **v.** **Utah Division of Oil, Gas & Mining,** **Respondent.**	**GENWAL'S BRIEF OPPOSING AMENDED DIVISION ORDER DO-10A, CRANDALL CANYON MINE** Docket No. 2010-026 Cause No. C/015/0032

Genwal Resources, Inc., permittee of the Crandall Canyon Mine ("**Permittee**" or "**Genwal**"), Permit No. C/015/0032, respectfully submits this Brief in opposition to the perpetual bonding requirements imposed by the Division of Oil, Gas and Mining (the "**Division**") in its Amended Division Order DO-10A ("**DO**" or "**Amended Order**"). That portion of the Order requiring Perpetual Bonding should be set aside as unlawful.

INTRODUCTION

On June 20, 2011, the Division interrupted settlement negotiations and ordered Genwal, in an amended Division Order, to execute an agreement to address mine water treatment and bonding on terms the Division had previously proposed in a confidential settlement offer. Those negotiations, initiated at this Board's request, were aimed at resolving Genwal's appeal of the original Division Order unprecedented cash bond as a trust fund for perpetual treatment of mine discharge at the Crandall Canyon Mine. The facts surrounding that Division Order and the mine discharge it concerns were previously briefed and argued for the Board in January, 2011. Pursuant to the Board's Order dated June 16, 2011, Genwal hereby files its procedural and legal objections to the Amended Division Order.

ARGUMENT

In its appeal of Division Order 10A Genwal argues that the previous DO was unlawful in that the Order fails to follow mandatory procedures and exceeds the Division's statutory bonding authority by demanding that Genwal establish a trust fund for perpetual treatment of the mine drainage. Genwal also argued that the Order was arbitrary and capricious because no need for perpetual treatment had been demonstrated.[1] Following briefing and oral argument on the legal issues, the Board authorized the parties to enter into settlement negotiations through June 21, 2011. By stipulation of the parties, the Board entered an Order allowing the Division to amend its DO and provided the parties an opportunity to amend their briefs on the legal issues and to address the Amended DO in argument at the July Board hearing. Board Order (June 16, 2011.)

When the Division sought this Board's permission to amend its Order, Genwal was compelled to concede that it had no reason to object to the Division's wish to change the Order.

The content of the Amended Order, however, is objectionable. The Division's Amended Division Order, like its predecessor, should be set aside as arbitrary, capricious, and exceeding the Division's lawful authority. The Amendment solves none of the problems that prompted Genwal to ask this Board to set aside the original Order. Moreover, the Amendment has no apparent purpose other than to prejudice Genwal before the Board. To the extent that the Division, through the Amended Order, extends to Genwal the opportunity to resolve the matter through a written agreement (*see* Amended DO at ¶5), the Division has already offered these terms to Genwal in the course of the confidential settlement discussions, and Genwal was unable to agree to them. Given that the Division knew when it amended the Order that Genwal could not accept these terms, the amendment seems to have no purpose other than to apprise the Board (and the public) of the rejected terms.[2] Such posturing in a formal government order is an abuse of the Division's statutory powers and should be disregarded, if not sanctioned, by this Board. The Division has failed in its amended order to cure any of the legal defects in the original Order and has actually made the situation worse by adding an alternative it knew to be meaningless. The amended Order, like the original, exceeds the Division's statutory powers and should be set aside.

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[1] By an approved stipulation and scheduling order, discovery and hearing on these factual issues are deferred until the legal issues have been addressed in a Board decision. Board Order (June 16, 2011.)

[2] Genwal notes with considerable consternation that the settlement proposals of both the Division and Genwal were agreed to be kept confidential and not offered into evidence at any hearing. The Division has breached that agreement by presenting its proposal to the Board in a public hearing. Genwal, however, will adhere to the stipulation and declines to publicize its several counter-proposals made to the Division.

I. THE AMENDED ORDER WAS ISSUED WITHOUT FOLLOWING THE MANDATORY PROCEDURES FOR ADJUSTING BOND AMOUNTS

Like the original, the Amended Order fails to specify the amount of the bond to be posted. Genwal pointed out in its reply brief that the Division has a mandatory duty to specify the amount to be posted when it orders a bond adjustment under the rules. *See* Petitioner's Reply Brief, at 4, Bd. Of Oil, Gas and Mining Order No. 2010-026 (Dec. 1, 2010). Consequently, any demand for a bond without specifying the amount is premature. The Division's own technical analysis recognized as much when it recommended "investigations and studies" into the feasibility of treatment options, whose purpose "is to provide the data required for designing and bonding a perpetual treatment system at the Crandall Canyon Mine." Utah Division of Oil, Gas & Mining, Hydrologic Evaluation of the Crandall Canyon Mine Discharge 27 (June 7, 2010). Therefore, not only has the Division failed to calculate the amount of a bond it will require, it has already determined that it cannot calculate that amount until treatability studies are concluded, and a permanent treatment plan (if needed) has been designed and approved. Accordingly, the demand is not only unlawful for failing to follow mandatory procedure, but it is arbitrary and capricious because, by the Division's own admission, the data necessary to set the bond amount are not yet available. While the Amended Order now contains an ad hoc suggestion for posting a bond, the Division has not approved a long-term treatment plan or bond estimates for such a plan. Genwal still has not been advised by the Division as to how much money is required to fund the bond, nor has it received an opportunity for a hearing on the basis for such a demand. The Board should instruct the Division to withdraw its demand for a bond of any kind until it approves a plan of treatment and the bond estimates required to fund these requirements.

II. THE AMENDED DIVISION ORDER PROPOSES AN UNAUTHORIZED ALTERNATIVE BONDING SYSTEM

As presently briefed and argued at the prior Board Hearing, Utah's Coal Program, as it is presently codified in statute and rule, does not authorize the Division to implement alternative bonding systems contemplated in the federal statute. Indeed (and perhaps unfortunately) only the Utah Legislature presently has the power to implement any form of alternative bonding system. Cp. 30 U.S.C. § 1259(c) with Utah Code § 40-10-15(c).[3] A state's alternative bonding system must be approved by the Secretary of the Interior prior to taking effect. 30 C.F.R. § 806.11(e) (2010).

The Division's proposal is illegal because the Secretary of the Interior will not permit a state to implement an ad hoc alternative bonding system. In 2009, the Office of Surface Mining issued its decision on the State of Wyoming's proposal to amend its approved state program to provide case-by-case authority to accept "an alternative method of financial assurance that is acceptable to the [state] Administrator and provides for a comparable level of assurance for performance of reclamation obligations." Office of Surface Mining, Wyoming Regulatory Program, 74 Fed. Reg. 52,677, 52,678–79 (Oct. 14, 2009). Even though Wyoming's proposed rule would require federal approval in every case where it intended to accept such a bond, OSM rejected the scheme because it was "too general" to be approved. *Id.* at 52,678. OSM stated that "an alternative method of financial assurance (i.e. an alternative bonding system) must be approved by OSM as part of a state program before it can be implemented." *Id.* (emphasis supplied.)

[3] The term "alternative bonding system" is not defined in either the federal or state programs. It refers generally to any mechanism established under 30 U.S.C. 1259(c) or an equivalent state program provision to accept financial assurances other than surety bonds, collateral bonds, or self-bonds to assure reclamation. *See* 30 C.F.R. § 800.11(e) (2010).

Both the initial demand for a perpetual funding mechanism, and the option in the Amended Order for interim and incremental deposits into such a perpetual fund, are illegal ad hoc alternative bonding systems. As explained in Genwal's prior pleadings, the Division's initial demand for perpetual funding is inconsistent with any now-authorized form of bond under the Utah Coal Program, including surety bonds, collateral bonds, or self bonds. As for the Amended Order, the Division in its pleadings unequivocally presents that proposal to the Board as an ad hoc alternative bonding system:

> "[T]he Division also believes alternative bonding formulas may also satisfy the Division's regulatory duties."
>
> "The Division has consider[ed] an alternative bonding option . . . ."
>
> "The Division is currently only asking for leave to amend the DO-10A in order to reduce into writing the Division's alternative bonding option so it can be considered by the Board."

See Division's Response to Genwal's Motion to Continue Evidentiary Hearing and Motion to Modify Division Order 10A at 4, Bd. of Oil Gas & Mining Docket No. 2010-026 (June 9, 2011) (emphasis supplied). Aside from the Division's own characterization, the Amended Order is an alternative bonding system because it is neither a surety bond, collateral bond, nor self bond but still purports to serve the purposes of the bonding statute. The Amended Division Order, however pragmatic[4], must be rejected because it purports to impose a duty on Genwal that exceeds the regulatory powers granted by any rule or statute.

[4] Genwal does not agree with the Division that its Amended Order represents a less onerous way to post a perpetual bond or that a perpetual bond is authorized.

III. THE AMENDED DIVISION ORDER'S DEMANDS FOR INTERIM SURETY AND PARENT COMPANY ASSURANCES EXCEEDS THE AUTHORITY GRANTED UNDER UTAH'S STATE PROGRAM

It is a fundamental principle of administrative law that the Division's authority is limited to those powers expressly granted by the Legislature, and the courts will set aside Division (and Board) action that exceeds the jurisdiction granted by statute. *See* Utah Code § 63G-4-403(4)(b) (LexisNexis 2010). The Division's jurisdiction with respect to bonding at coal mines is limited in two ways that preclude the present demand. First, the amount of the bond is limited to the costs of performing reclamation, defined as those actions taken to restore mined land to a condition consistent with its postmining land use. Utah Code § 40-10-15(1); *see* Utah Admin. Code R645-100-200 (2010). Second, the form of the bond is limited to those specifically enumerated in statute and no others. *See* Utah Code 40-10-15(2)–(3).

Three aspects of the proposed bond set forth in the Amended Order, in particular, impose requirements beyond the limits of any statutory authority. First, the Division's demand in paragraph 5 that the agreement shall be guaranteed by Murray Energy, Genwal's parent company, is completely arbitrary and contrary to statute. The bonding statute provides that the bond shall be executed by the "operator" which is Genwal, not Murray Energy. *See* Utah Code § 40-10-15(2). Second, the demand for an "Interim Surety" in paragraph 5.B. to cover operating expenses of the temporary treatment facility is not authorized. These day-to-day operating expenses of a permitted facility are not among the postmining land restoration costs of reclamation for which bonding is required. Third, the enforcement provisions in paragraph 5.I. exceed the Division's enforcement powers set forth in Utah Code § 40-10-20, the procedures for bonding and general bond conditions set forth at R645-301-800 and deprive both Genwal and Murray Energy of due process of law. Each of these innovations proposed by the Division

prevents the Board from making the finding requested in paragraph 6 of the Amended Order that the alternative bonding arrangement suggested "meets the requirements of the [Utah Coal Mining and Reclamation] Act."[5] Accordingly, the Amended Order should be set aside as exceeding the authority granted to the Division and Board by statute.

In pointing out these limitations on bonding authority, Genwal does not argue that it bears no responsibility for assuring that mine discharges meet applicable standards, but only that this responsibility is not of a type for which bonding is authorized.

IV. THE EXPERIENCES OF OTHER STATE PROGRAMS ILLUSTRATE THAT THE ALTERNATIVE BONDING THE DIVISION DEMANDS CAN BE IMPLEMENTED ONLY AFTER LEGISLATION OR RULEMAKING

The Division incorrectly asserts in its Motion that the experiences of other state programs confirm that authority exists to implement the bonding system proposed in the Amended Order. The Division fails to acknowledge, however, that in each example cited, the regulatory authority implemented those systems only through legislation or rulemaking. In Tennessee, where OSM is the regulatory authority, that Office under threat of litigation withdrew its Field Office Policy Memorandum describing an alternative bonding system aimed at treating long-term mining discharges. In its place, it promulgated rules through notice and comment procedures. Office of Surface Mining, Tennessee Federal Regulatory Program: Final Rule, 72 Fed. Reg. 9616, 9617–18 (Mar. 2, 2007). The Division is correct that OSM asserted that the federal Surface Mining Control and Reclamation Act ("**SMCRA**") provided authority to implement such a system through rulemaking, but the Division makes an unsupported logical leap by offering the Tennessee example in support of taking a similar action without rulemaking. Tennessee stands

[5] As noted in Part II of this Memorandum, a similar provision for agency approval of an ad hoc bonding arrangement contained in Wyoming's proposed rules did not persuade OSM to permit the practice.

as an example of what the State of Utah has not done, rather than what it is empowered to do. As already explained, both Pennsylvania and West Virginia proceeded with bonding systems addressing long-term postmining discharges only after legislative action. In any event, as the Wyoming example shows, a state proposing to regulate in this area must define its program through appropriate legislation and obtain the Secretary's approval before imposing those regulations on the public. Because the Division has failed to complete (or even begin) this process, its imposition of an ad hoc alternative bonding requirement on Genwal exceeds its lawful authority and must be set aside.

CONCLUSION

In its earlier memorandum to the Board, Genwal argued that the Division must work with the tools it has been given by the Legislature and the Board, and that the financial assurance demanded by the Order is not among these tools. In the Amended Order, the Division again purports to regulate Genwal using tools it has not been provided by any statute or rule. While Genwal has fully accepted responsibility for maintaining mine drainage within all legal limits, it has a right to be free of onerous, ad hoc government demands, however well intentioned. Even when the demands are lawful, Genwal is entitled to demand that the government follow all of its established procedures and provide every applicable procedural safeguard. The Division has failed at both of these tasks, and the Amended Order cures neither. Accordingly, the revised paragraph III and paragraph V.2 of the Amended Order should be set aside.

DATED this 11th day of July, 2011.

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **GENWAL'S BRIEF OPPOSING AMENDED DIVISION ORDER DO-10A, CRANDALL CANYON MINE,** were delivered on July 11, 2011, to the following:

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